No. 88-1861

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

1. JAMES STRYKER and HENRY GROSSKLAGS,

Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,

Respondents,

2. THOMAS LOUGHLIN,

Petitioner,

v.

DAVID EUGENE GERSCH,

Respondent,

3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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May 15, 1989

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I. QUESTIONS PRESENTED

1. Whether the Supremacy Clause requires preemption of state appellate procedures that preclude a public official from exercising his federal substantive right to pretrial appeal of a denial of his immunity from a § 1983 claim.

2. Whether the Privileges or Immunities Clause precludes a state court from infringing a public official's right to qualified immunity from state torts, which immunity the State recognizes, by failing to allow a pretrial appeal of a denial of such right.

II. LIST OF PARTIES

In addition to the parties set forth in the caption, the following parties are also involved in the cases below:

Investigator Kirby Hodgkin;
Summit County Sheriff's Department, Colorado;
Silverthorne Police Department, Colorado;
The Town of Silverthorne, Colorado; and
Klode Towing, Denver, Colorado.

III. TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Board of Education of Albuquerque, 748 P.2d 516 (N.M.App. 1987) 10

Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986) 9

Ansell v. Shannon, No. 88-394, *cert. denied* December 5, 1988 9

Bollinger by Carraghan v. Obrecht, 552 A.2d 359 (Pa. 1989) 10

Breault v. Chairman of Board of Fire Commissioners, 401 Mass. 26, 513 N.E.2d 1277, *cert. denied* 108 S.Ct. 1078 (1987) 9

Celebrezze v. Netzley, 1988 W.L. 87566 (Ohio App. 1988) 10

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 8

Cooper v. Hollis, 42 Colo.App. 505, 600 P.2d 109 (1979) 4, 6

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988) 10

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 6

Felder v. Casey, ___ U.S. ___, 108 S.Ct. 3202, 101 L.Ed.2d 123 (1988) 6, 7

Fore v. Circuit Court of Izard County, 723 S.W.2d 840 (Ark. 1987) 10

Kaplan v. Pointer, 501 A.2d 1269 (D.C.App. 1985) 10

Malley v. Briggs, 475 U.S. 335 (1986) 6

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) 4, 5, 6, 9, 11

Noyola v. Flores, 740 S.W.2d 493 (Tex.App. 1987)..... 9

Ohio Civil Service Employees Association v. Moritz, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (1987)..... 9

Owen v. City of Independence, 445 U.S. 622 (1980) 8

Pierson v. Ray, 386 U.S. 547 (1967) 4, 6

Pizzato's Inc. v. City of Berwyn, 523 N.E.2d 51 (Ill.App. 1988) *cert. denied* March 7, 1989..... 9

Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988)..... 9

Robinson v. Beaumont, 725 S.W.2d 839 (Ark. 1987) 9

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)...8, 9

State v. Hogg, 311 Md. 446, 535 A.2d 923 (1988)..... 10

Swain v. Lindsey, No. 88-1168, *cert. denied* March 7, 1989 9

OTHER AUTHORITIES:

Report to the Colorado General Assembly: Governmental Liability in Colorado, Colorado Legislative Council, research publication no. 134 (November 1968).....4, 8

Welch, *Qualified Immunity & State Torts*, 8 Rev. of Litigation 53 (1988)..... 11

No. _____

In The

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1. JAMES STRYKER and HENRY GROSSKLAGS,

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WILLIAM EDWARD DECKER and LINDA DECKER,

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2. THOMAS LOUGHLIN,

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DAVID EUGENE GERSCH,

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3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

Petitioners respectfully pray that a writ of *certiorari* issue to review the orders of the Court of Appeals for the State of Colorado denying appellate jurisdiction for pretrial review of a denial of immunity in each of the four cases herein.

OPINIONS BELOW

In each case the court below by minute order and without opinion refused to consider pretrial appellate review of a denial of a public official's qualified immunity, on the grounds it was without jurisdiction to do so.[1] Said orders are found in the appendix hereto.

JURISDICTION

Appeal from the trial court's denial of a claim of immunity by each petitioner was brought before the Court of Appeals for the State of Colorado. In each of the four cases, pursuant to an order to show cause, the Court of Appeals dismissed the appeal. Thereafter, each petitioner applied to the Supreme Court for the State of Colorado seeking *certiorari* review. That court denied review of all the cases on February 13, 1989. This Petition for Certiorari is filed within 90 days of that date.

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[1] Colorado Appellate Rule 1(a)(1) provides "[a]n appeal to the appellate court may be taken from (1) A final judgment of any district . . . court . . . ." The court below found there was no final, appealable judgment.

The jurisdiction of this Court to review the orders of the Colorado Court of Appeals is invoked under 28 U.S.C. § 1257(3).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Amendment Fourteen, § 1: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

All four cases herein concern the right to pretrial appeal of the denial of a public official's entitlement to immunity. In *Stryker v. Decker,* both state tort claims and a federal claim under 42 U.S.C. § 1983 were asserted arising from an alleged false arrest. In *Loughlin v. Gersch,* a state tort claim of malicious prosecution arose from an alleged

false charge of operating a towing vehicle without a city license. The remaining two cases, *City & Co. of Denver v. Hight-Berry* and *Kukuris v. Zapp*, concern state torts arising from police chases in which the fleeing suspect injured the respondent. In all four cases, petitioners asserted in a motion for summary judgment their immunity to either the federal or state claims. The immunity asserted in each case arose under the common law as recognized by this Court in *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967); as recognized by *Cooper v. Hollis*, 42 Colo.App. 505, 600 P.2d 109, 111 (1979), the only Colorado case regarding qualified immunity and which specifically relied upon *Pierson v. Ray;* and as recognized by Colorado's legislative history to its Immunity Act, *Report to the Colorado General Assembly: Governmental Liability in Colorado*, Colorado Legislative Council, research publication no. 134 (November 1968). Petitioners appealed in all cases as a matter of right under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

In each case, the Court of Appeals issued an order to show cause as to why the appeal should not be dismissed for lack of a final, appealable judgment. In response thereto, petitioners asserted that they possessed a substantive right to pretrial appeal of the denial of their immunity under *Mitchell v. Forsyth, supra*. Petitioners further asserted that a denial of a pretrial appeal would abridge their Fourteenth Amendment due process rights and their rights under the Privileges or Immunities Clause. The Court of Appeals dismissed the appeals upon the order to show cause (Appendix A-2, B-2, C-2, D-2).[2]

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[2] A stamp with handwritten remarks comprises the order dismissing the appeals. The handwriting is reproduced in print.

The Colorado Supreme Court denied *certiorari* in all cases on February 13, 1989 (Appendix A-2, B-2, C-3 and D-3).

REASONS FOR GRANTING THE WRIT

This petition concerns a public official's right to pretrial appeal in state court from the denial of immunity to federal and state claims. This is a matter of first impression for this Court: (1) this Court has never addressed whether state courts under the Supremacy Clause are required to follow federal substantive law relating to the right of a public official to pretrial appeal of a denial of his immunity from suit, and (2) this Court has never addressed whether the Privileges or Immunities Clause gives constitutional protection to immunities recognized in the first instance by state courts. In addition, there is a split among the state courts on whether to grant a pretrial appeal of a denial of immunity against § 1983 claims filed in state court. Finally, as the law is now interpreted in the State of Colorado concerning § 1983 cases, contrary rules protecting the substantive right not to stand trial exist in its federal and state courts.

As this Court recognized in *Mitchell*, 472 U.S. at 526, immunity is "an *immunity from suit* rather than a mere defense to liability . . . " (emphasis in original). In *Mitchell*, this Court equated a civil defendant's right to immunity with a criminal defendant's right to be free from double jeopardy. *Id.* at 525.

In fashioning the qualified immunity right in cases arising under § 1983, this Court has recognized that § 1983 "on its face admits of no immunities, [although

this Court has] read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley v. Briggs*, 475 U.S. at 339. *See also Pierson v. Ray*, 386 U.S. at 556-57, in which this Court first granted the defense of good faith (now known as qualified immunity) to police officers, borrowing from common-law theories. The Colorado case first recognizing good faith, qualified immunity, *Cooper v. Hollis, supra*, also relied on *Pierson*.

The Supremacy Clause preempts state procedures that infringe federal rights, including the right to immunity. This Court has recently held that a State may not apply a notice of claim provision (applicable to state torts) to a § 1983 claim when the notice of claim provision could not be applied against a § 1983 claim asserted in that State's federal court. *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 3202, 101 L.Ed.2d 123 (1988). In so holding, this Court recognized that the equal protection doctrine applicable in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), applied in the reverse context:

> Just as federal courts are constitutionally obligated to apply state law to state claims [citation omitted], so too the *Supremacy Clause imposes on state courts a* constitutional duty "to proceed in such manner that *all substantial rights of the parties under controlling federal law [are] protected.*"

Felder, 108 S.Ct. at 2313 (emphasis added). Because, as pointed out in *Mitchell*, immunity is a substantial right of one of the parties, the state court is required under the Supremacy Clause to protect that right. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material

when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder*, 108 S.Ct. at 2306. As also noted by this Court, " 'Congress . . . surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.' " *Id.* at 2309.

The general principle in *Felder*, which concerned the substantive right of a *plaintiff*, applies with equal force to a civil *defendant*. This principle is self-evident in the petition of *Stryker v. Decker* in which the state appellate court has denied petitioners the pre-trial appellate protection of their substantive right not to stand trial in defense of a § 1983 claim expressly recognized by this Court. Hence, the availability of Petitioners' right depends solely on where the case is filed.

This principle is equally compelling in the remaining three cases precisely because immunity is a common-law right recognized by this Court (and adopted by the Colorado courts) and any protections this Court has recognized regarding that common-law right apply with equal force to both federal and state courts. Guidance from this Court is required not only for state courts but also for federal courts that will be required to consider whether a denial of immunity to a state tort (over which the federal court has pendent jurisdiction) is immediately appealable. Hence, the central issue presented herein involves the strength and universality of a public official's substantive immunity right to be free from the burdens of trial arising in state and federal courts.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges *or immunities* of citizens of the United States . . . " (emphasis added). The Privileges or Immunities Clause was first discussed in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The opinion therein, and cases following, concerned solely "privileges"; neither this Court nor any other court to petitioners' knowledge has interpreted the phrase "or immunities" as that phrase stands alone, even though the tradition of immunity was firmly rooted in the common law at the time § 1983 and the Fourteenth Amendment were enacted. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

The *Slaughter-House Cases* instruct that privileges or immunities "have always been held to be the class of rights which the State governments were created to establish and secure." 83 U.S. at 76. The State of Colorado has specifically recognized the common-law right of qualified immunity and has enacted the corresponding statutory right based upon the common-law principle that immunity is a defense to suit, not merely a defense to liability.[3] As the *Slaughter-House Cases* made clear, the right must be one initially recognized by the State. This principle is analogous to cases involving an alleged deprivation of a property interest: once a State recognizes an expectation of continued employment, a federal court may intervene and determine whether due process was granted in terminating such employment. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). The same

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[3] *See Report to the Colorado General Assembly, supra.*

principle applies herein: once the State recognizes the common-law right of immunity this Court may ensure that that right is protected under the Privileges or Immunities Clause.

In addition, the entitlement to immunity is fundamental (a prerequisite under the *Slaughter-House Cases* for protection under the Privileges or Immunities Clause, *see* 83 U.S. at 76) as measured by the fact that immunity arises from the earliest traditions of the common law. Consequently, petitioners' immunity asserted herein, recognized by the earliest traditions of the common law and by the State, satisfies those requirements of the *Slaughter-House Cases* and is a right of constitutional character.

The state courts are split on whether a denial of immunity in a § 1983 suit may be immediately appealed. Those cases in accord with *Mitchell* are *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *Breault v. Chairman of Board of Fire Commissioners*, 401 Mass. 26, 513 N.E.2d 1277, *cert. denied* 108 S.Ct. 1078 (1987); *Robinson v. Beaumont*, 725 S.W.2d 839 (Ark. 1987); and *Anderson v. City of Hopkins*, 393 N.W.2d 363 (Minn. 1986).

Those cases which do not follow *Mitchell* in a § 1983 context are *Pizzato's Inc. v. City of Berwyn*, 523 N.E.2d 51 (Ill.App. 1988), *cert. denied* March 7, 1989; *Noyola v. Flores*, 740 S.W.2d 493 (Tex.App. 1987); and *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (1987). *See also* the petition of *Swain v. Lindsey*, No. 88-1168, *cert. denied* March 7, 1989, denying *certiorari* from an unpublished order of the Kentucky Court of Appeals; and *Ansell v. Shannon*, No. 88-394, *cert. denied*

December 5, 1988, denying *certiorari* from an unpublished order of the Colorado Court of Appeals.

Furthermore, there is a split among the States as to whether immunity to a state tort is recognized as an entitlement not to stand trial, thus permitting pretrial appeal. Those granting an immediate appeal are *Elwood v. Rice County*, 423 N.W.2d 671 (Minn. 1988) (pretrial appeal granted for denial of immunity regarding battery claim); *State v. Hogg*, 311 Md. 446 535 A.2d 923 (1988) (pretrial appeal granted regarding denial of sovereign immunity against claim that state mismanaged insurance fund); *Fore v. Circuit Court of Izard County*, 723 S.W.2d 840 (Ark. 1987) (pretrial appeal granted regarding denial of immunity in workmen's compensation context) and *Kaplan v. Pointer*, 501 A.2d 1269 (D.C.App. 1985) (pretrial appeal granted for common-law action of intentional infliction of emotional distress). *See also* unpublished opinion of Ohio Court of Appeals, *Celebrezze v. Netzley*, 1988 W.L. 87566 (Ohio App. 1988)[4] (in a libel case a denial of the immunity recognized by the First Amendment is immediately appealable).

Cases which do not allow pretrial appeal from a denial of immunity to a state tort are *Bollinger by Carraghan v. Obrecht*, 552 A.2d 359 (Pa. 1989) (involving a denial of state statutory immunity arising out of a personal injury which occurred at a school); and *Allen v. Board of Education of Albuquerque*, 748 P.2d 516 (N.M.App.

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[4] Under Ohio's Supreme Court rules for the reporting of opinions, Rule 2(G), this case may be cited as persuasive authority.

1987) (regarding a denial of immunity arising out of an accident occurring at a school).

Of course, there is also a split between this Court and those state courts, above, that do not follow the rule set forth in *Mitchell*. Petitioners have found no cases in which a federal court of appeals has addressed whether a denial of immunity to a state tort filed in federal court is immediately appealable.

This petition raises complex matters of federalism requiring the intervention of this Court. Because § 1983 suits present a unique mix of common-law and federal principles, this Court must determine if it is the final arbiter of those common-law, as well as federal, principles. Second, if state courts are allowed to apply their own rules in derogation of those rules recognized by federal courts, § 1983 defendants will be compelled to remove *all* § 1983 actions to federal courts to insure that their rights are recognized. *See* Welch, *Qualified Immunity & State Torts*, 8 Rev. of Litigation 53, 65 (1988). Wholesale removals will further clog the federal courts and defeat the policy of promoting state court jurisdiction of § 1983 claims. Third, this Court must establish the parameters of the pretrial appellate protection afforded the common-law immunity principle it has recognized, and whether immunity, given its longstanding history, is granted constitutional protection under the Privileges or Immunities Clause.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

THEODORE S. HALABY
Counsel of Record

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APPENDIX A

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-0693

RESPONSE TO ORDER TO SHOW CAUSE

WILLIAM EDWARD DECKER and LINDA DECKER,
Plaintiffs-Appellees,

v.

JAMES STRYKER and HENRY GROSSKLAGS,
Defendants-Appellants,

and

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, SILVERTHORNE POLICE DEPARTMENT and the CITY OF SILVERTHORNE, COLORADO,

Defendants.

HALABY & McCREA

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ATTORNEYS FOR
DEFENDANTS-APPELLANTS
STRYKER AND GROSSKLAGS

Appeal Dismissed

November 3, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC633
Certiorari to the Colorado Court of Appeals 88CA0693
Summit County District Court 86CV323

ORDER OF COURT

JAMES STRYKER and HENRY GROSSKLAGS,
Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,
Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

APPENDIX B

COLORADO COURT OF APPEALS

No. 88CA0538

DAVID EUGENE GERSCH, Plaintiff-Appellee, v. OFFICER THOMAS LOUGHLIN, Defendant-Appellant.	)	ORDER TO SHOW CAUSE (Trial Ct. No. 85CV11869)

To: Officer Thomas Loughlin and his attorneys, Theodore S. Halaby and Robert M. Liechty

From the notice of appeal filed by appellant and the register of actions submitted by the clerk of the district court, it appears that the appeal is from an order denying a motion for summary judgment and that, therefore, there is not yet a final appealable judgment. *See Glennon Heights, Inc. v Central Bank & Trust,* 658 P.2d 872 (Colo. 1983); *Manuel v. Fort Collins Newspapers, Inc.,* 631 P.2d 1114 (Colo. 1981).

Alternatively, it appears that the trial court directed entry of a written order, but that none has been prepared or executed by the trial court. Thus, there may not yet be a final, appealable judgment. *See* C.R.C.P. 58(a).

It is THEREFORE ORDERED that appellant shall show cause, if any he has, in writing on or before September 23, 1988, why this appeal should not be dismissed without prejudice for lack of a final, appealable judgment.

Dated: September 6, 1988

APPEAL DISMISSED

BY THE COURT

September 30, 1988

Having considered the response to this order, it is ordered that the appeal is dismissed.

Smith, J.
Plank, J.
Marquez, J.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC577
Certiorari to the Colorado Court of Appeals 88CA0538
Denver District Court 85CV11869

ORDER OF COURT

OFFICER THOMAS LOUGHLIN,
Petitioner,

v.

DAVID EUGENE GERSCH,
Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

APPENDIX C

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-1393

APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE

JO ANN HIGHT-BERRY,

Plaintiff-Appellee,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; MAYOR FEDERICO PENA, individually and in his official capacity as Mayor; CHRIS HOAG, individually and in their official capacity as members of the Police Department of the City and County of Denver; CHIEF THOMAS COOGAN, Chief of the Denver Police Department, individually and in his official capacity as Chief of Police; and J. D. MacFARLANE, individually and in his official capacity as Manager of Safety of the City and County of Denver, State of Colorado,

Defendants-Appellants.

Appeal From The District Court
For The City And County Of Denver
Civil Action No. 85-CV-13543
The Honorable J. Stephen Phillips Presiding

HALABY & McCREA

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ATTORNEYS FOR
DEFENDANTS-APPELLANTS

Appeal Dismissed

November 3, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC632
Certiorari to the Colorado Court of Appeals 88CA1393
Denver District Court 85CV13543

ORDER OF COURT

THE CITY AND COUNTY OF DENVER, a municipal corporation; MAYOR FEDERICO PENA, individually and in his official capacity as Mayor; CHRIS HOAG, individually and in his official capacity as a member of the Police Department of the City and County of Denver; CHIEF THOMAS COOGAN, Chief of the Denver Police Department, individually and in his official capacity as Chief of Police; and J.D. MacFARLANE, individually and in his official capacity as Manager of Safety of the City and County of Denver, State of Colorado,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review

of the record, the briefs, and the opinion of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

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APPENDIX D

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-1141

APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE

JERRY ZAPP and RUTH ZAPP,

Plaintiffs-Appellees,

v.

JAMES KUKURIS, JOHN SPEZZE, KEITH L. COWGILL, JOHN PRICE, and "JOHN DOE," POLICE OFFICERS OF THE CITY AND COUNTY OF DENVER, Individually; and THE CITY AND COUNTY OF DENVER, COLORADO, a Colorado Municipal Corporation,

Defendants-Appellants,

and

M.P. KELLY, TIMOTHY O'BRIEN, "JOHN DOE", POLICE OFFICERS OF THE CITY OF AURORA, Individually; THE CITY OF AURORA, COLORADO, a Colorado Municipal Corporation; and PHILLIP GOGGIN,

Defendants.

HALABY & McCREA

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ATTORNEYS FOR
DEFENDANTS-APPELLANTS
KUKURIS, SPEZZE, COWGILL,
PRICE AND THE CITY AND
COUNTY OF DENVER

Appeal Dismissed

Oct. 4, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC578
Certiorari to the Colorado Court of Appeals 88CA1141
Denver District Court 88CV1831

ORDER OF COURT

JAMES KUKURIS, JOHN SPEEZE, KEITH L. COWGILL, JOHN PRICE, and "JOHN DOE," POLICE OFFICERS OF THE CITY AND COUNTY OF DENVER, Individually; and THE CITY AND COUNTY OF DENVER, COLORADO, a Colorado Municipal Corporation,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

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